IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 12TH JULY 2007 / 21ST ASHADHA 1929

SA.No. 363 of 1994()

(AGAINST THE JUDGMENT AND DECREE IN AS.51/1990 OF THE COURT OF SUBORDINATE JUDGE, PAYYANNUR DATED 15/10/93 AGAINST THE JUDGMENT AND DECREE IN OS.297/1986 OF THE COURT OF MUNSIFF, PAYYANNUR DATED 31/10/89)

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APPELLANT: APPELLANT:PLAINTIFF:

EDATHILE VALAPPIL PARU,
D/O.KORAN,
RESIDING AT VELLUR AMSOM,
KANDOTH DESOM, TALIPARAMBA TALUK.

BY ADV. SRI.M.P.ASHOK KUMAR

RESPONDENT:RESPONDENT:DEFENDANT:

PAYYANNUR MUNICIPALITY,
REPRESENTED BY THE COMMISSIONER.

BY ADV. SRI.GRASHIOUS KURIAKOSE

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.689/1994 IN S.A.NO.363/1994

DISMISSED

12/07/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.S.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.363 OF 1994

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Dated this the 12th day of July, 2007

JUDGMENT

Appellant instituted O.S.297/1986 before Munsiff Court, Payyannur seeking a decree for permanent prohibitory injunction restraining respondent Municipality from demolishing the compound wall constructed by him contending that he erected the wall using mud and boulders twenty years back and the wall is not a construction coming within the definition of Kerala Municipalities Act and the Rules framed and a notice was issued under section 247(1) of Kerala Municipalities Act to demolish the same and respondent has no right to demolish it and therefore respondent is to be restrained by a decree for permanent prohibitory injunction. Respondent in the written statement contended that the road was constructed by a Committee formed by the public in the locality and the road starts from

Sreenarayanaguru Vayanasala and ends at Kunduvalappu kandom and the road is maintained by the Panchayat and the property of the appellant is abutting the road and without obtaining permission or licence to construct the compound wall, appellant constructed the compound wall using mud and boulder stones. Immediately Executive officer of the Panchayat visited the spot and having satisfied that appellant trespassed into a portion of the road and was trying to construct a compound wall, issued preventive order under section 247(1) and show cause notice under section 247(2) of the Kerala Municipalities Act and the appellant has filed the suit and respondent is entitled to proceed as provided under section 247 of the Act and the suit is not maintainable and is to be dismissed.

2. Learned Munsiff on the evidence dismissed the suit holding that though the suit is maintainable, as appellant did not obtain any

licence or permission to construct the compound wall, respondent is entitled to proceed under section 247 of the Municipalities Act and therefore appellant is not entitled to the decree sought for. Appellant challenged the decree and judgment before Sub Court, Payyannur in A.S.51/1990. Learned Sub Judge on reappreciation of evidence dismissed the appeal holding that as against the order issued under section 247(1) or the final order to be passed an appeal is provided under section 364 of the Kerala Municipalites Act and even against the dismissal of the appeal, a revision is provided before the Government and therefore when an alternate and efficacious remedy is available to the appellant, suit is not maintainable. Learned Sub Judge also found that as the compound wall was constructed without licence, Municipality is competent to proceed as provided under section 247 and therefore the appellant is not entitled to the decree sought for. The appeal was dismissed. It is

challenged in the second appeal.

3. The second appeal was admitted formulating the following substantial questions of law.

1) When a compound wall is constructed in a Panchayat area prior to the notification which makes applicable the municipal building rules, is the executive officer of the Panchayat entitled to direct demolition of the wall on the ground that it is in violation of the Municipal Building Rules?

2) Whether Section 364 of the Municipalities Act is a bar to a suit under section 9 of CPC as it does not expressly or impliedly bar a suit.

3) As the lower appellate court correct in finding that the suit is not maintainable when there is no express bar for filing a suit under section 9 of the CPC in the Municipalities Act or Rules?

4. Learned counsel appearing for appellant and counsel for respondent were heard.

5. When a compound wall is constructed by the

appellant on the side of the road without taking licence or permission, Section 247 of the Kerala Municipalities Act enables the Municipality to take action. It is pursuant to that power, and having satisfied that a construction is being made the Municipality issued a preventive order as well as notice to show cause why the preventive order shall not be made absolute. As against the preventive order as well as the final order, an appeal lies under section 364 of the Kerla Municipalities Act. Even as against the order passed in the appeal, a revision is provided before the Government. In such circumstance, as found by the first appellate court, when the appellant is provided with an equal and efficacious remedy, appellant is not entitled to institute the suit and that too a suit for permanent prohibitory injunction restraining respondent Municipality from exercising the statutory duty provided under the Act. Though it was contended by the appellant that the compound

wall was constructed before the issuance of the notification making the Municipalities Act, applicable to the then Panchayat area, courts below on the evidence found that construction was not made earlier as canvassed by appellant. That factual finding cannot be interfered in exercise of the powers of the court under section 100 of the Code of Civil Procedure. Hence the first substantial question of law does not arise on the facts of the case. In such circumstance, appeal is dismissed. It is made clear that the dismissal of the appeal will not affect the right of the appellant to challenge any order passed by the Municipality as provided under the Kerala Municipalities Act.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.363 /94

JUDGMENT

12TH JULY,2007